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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA - FRESNO DIVISION

In re

TERRY L. WILLEMS AND JANICE L.
WILLEMS,

Debtor(s).

Case No. 10-11509-A

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

GMAC MORTGAGE, LLC ,

Movant,

vs.

TERRY L. WILLEMS AND JANICE L.
WILLEMS, Debtor(s); JAMES EDWARD
SALVEN, Chapter 7 Trustee,

Respondents.

LBR 4001-1 and 9014-1(f)(1)

DATE: June 22, 2010
TIME: 1:30 p.m.
CTRM: 11

2500 Tulare Street,
Fresno, CA 93721-1318

GMAC Mortgage, LLC ¹ ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary to enforce its security interest in real property generally described as 2507 South 24th Avenue, Kingsburg, California 93631.

¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004

1 On or about February 16, 2010, Terry L. Willems and Janice L. Willems ("Debtors") filed a
2 voluntary petition under Chapter 7 of the Bankruptcy Code, and James Edward Salven was
3 appointed as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against
4 Debtors and the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

5 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I.**

8 **MOVANT IS ENTITLED TO RELIEF FROM THE**
9 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

10 **NO EQUITY**

11 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
12 debtor does not have any equity in the property and the property is not necessary to the debtor's
13 effective reorganization.

14 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
15 § 362(d)(2) reflects congressional intent to allow creditors to
16 immediately proceed against the property where the debtor has no
17 equity and it is unnecessary to the reorganization, even where the
debtor can provide adequate protection under § 362(d)(1). (Emphasis
added).

18 Id. at 610 (emphasis added).

19 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
20 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
21 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief
22 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th
23 Cir. 1984).

24 An appropriate cost of sale factor should also be added to determine if the debtor has any
25 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
26 (Bankr. S.D. Cal. 1982).

27 On or about September 1, 2006, Debtors, for valuable consideration, made, executed and
28 delivered to SBM Mortgage ("Lender") a Note in the principal sum of \$260,000.00 (the "Note").

1 Pursuant to the Note, Debtors are obligated to make monthly principal and interest payments
2 commencing November 1, 2006, and continuing until October 1, 2036, when all outstanding
3 amounts are due and payable. The Note provides that, in the event of default, the holder of the Note
4 has the option of declaring all unpaid sums immediately due and payable. A true and correct copy of
5 the Note is attached to the concurrently served and filed Exhibits to the Declaration in Support of
6 Motion for Relief From Automatic Stay ("Exhibits") as exhibit A and incorporated herein by
7 reference.

8 On or about September 1, 2006, the Debtors made, executed and delivered to Lender a Deed
9 of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly
10 described as 2507 South 24th Avenue, Kingsburg, California 93631 (the "Real Property"), which is
11 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs
12 incurred as a result of the Debtors' bankruptcy case may be included in the outstanding balance
13 under the Note. The Deed of Trust was recorded on September 20, 2006, in the Official Records of
14 Fresno County, State of California. A true and correct copy of the Deed of Trust is attached to the
15 Exhibits as exhibit B and incorporated herein by reference.

16 Subsequently, Lender's beneficial interest in the Deed of Trust was sold, assigned and
17 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust
18 evidencing the Assignment of the Deed of Trust to Movant is attached to the Exhibits as exhibit C
19 and incorporated herein by reference.

20 The obligation under the Note is in default as of August 1, 2009, for failure to make
21 payments to Movant. As of February 24, 2010, the total principal obligation due and owing under
22 the Note is in the approximate amount of \$245,841.66. This is an approximate amount for purposes
23 of this Motion only, and should not be relied upon as such to pay off the subject loan as interest and
24 additional advances may come due subsequent to the filing of the Motion. An exact payoff amount
25 can be obtained by contacting Movant's counsel. Further, Movant has incurred additional post-
26 petition attorneys' fees and costs in bringing the instant Motion. Moreover, the total arrears under
27 the Note are in the approximate sum of \$16,036.05, excluding the post-petition attorneys' fees and
28 costs incurred in filing the instant Motion.

1 II.

2 **RELIEF FROM STAY**

3 **LACK OF EQUITY**

4 Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and
5 Statements, the fair market value of the Property is approximately \$207,000.00. True and correct
6 copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as
7 exhibit D and incorporated herein by reference.

8 Based on the above, Movant maintains that the equity in the Property is as follows:

| | |
|---|--------------------|
| 9 Fair Market Value: | \$207,000.00 |
| 10 Less: | |
| 11 Movant's Trust Deed | \$245,841.66 |
| Bank of America – 2 nd Deed of Trust | \$77,872.36 |
| Costs of Sale (8%) | <u>\$16,560.00</u> |
| 12 Equity in the Property: | \$<133,274.02> |

13 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this
14 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to
15 relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

16 III.

17 **MOVANT IS ENTITLED TO RELIEF FROM THE**
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).

18 **CAUSE - LACK OF ADEQUATE PROTECTION**

19
20 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate
21 protection of its interest in the Property.

22 Movant submits that adequate protection in this case requires normal and periodic cash
23 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
24 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

25 Movant is informed and believes that Debtors are presently unwilling or unable to provide
26 adequate protection to the Movant and there is no probability that adequate protection can be
27 afforded to Movant within a reasonable time.

28 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.

1 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

2 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

3 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by
4 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

5 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

6 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
7 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
8 the Property;

9 4. Permitting Movant to offer and provide Debtors with information re: a potential
10 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
11 Mitigation Agreement, and to enter into such agreement with Debtors;

12 5. Alternatively, in the event this court declines to grant Movant the relief requested above,
13 Movant requests that an Order for adequate protection be issued, requiring the Debtors to reinstate and
14 maintain in a current condition all obligations due under the Note and Deed of Trust and all other deeds of
15 trust encumbering the Real Property, including Debtors' obligations to pay when due (a) the monthly
16 installments of principal and interest, as required under the Note; (b) tax/insurance obligations; and (c) any
17 sums advanced by Movant on behalf of Debtors in order to protect Movant's interest in the Real Property,
18 including all attorneys' fees and costs incurred in the filing of this motion;

19 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
20 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law; and

21 7. For such other and further relief as the court deems just and proper.

22 Dated: May 17, 2010

PITE DUNCAN, LLP

23 /s/ Joseph C Delmotte CA SBN 259460

24 JOSEPH C DELMOTTE

Attorneys for GMAC MORTGAGE, LLC